

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

FRIENDS OF THE COLUMBIA, INC.,)

Appellant,)

v.)

State of Washington, DEPARTMENT
OF ECOLOGY,)

Respondent.)

PCHB No. 87-59

ORDER DENYING
MOTION TO RECONSIDER
DISMISSAL

On April 30, 1987 the Pollution Control Hearings Board ("Board") issued an Order dismissing appellant Friends of the Columbia, Inc., ("Friends") appeal, based on lack of jurisdiction.

Thereafter, on May 6, 1987, appellant lodged a letter with the Board asserting an array of legal theories in further support of its appeal. By letter filed May 14, 1987, appellant characterized this May correspondence as a motion or request to set aside the Board's Order of Dismissal. Respondent Department of Ecology ("Department") did not file a response to the Motion.

1 Having reviewed the entire file herein, the Board concludes that
2 the Motion should be denied for the reasons set forth below.

3 1. Appellant asserts that the Board has jurisdiction to hear
4 appeals from decisions of DOE, and that the Board is not just
5 restricted to hearing appeals from orders (alone). Appellant further
6 contends that the Board, therefore, has jurisdiction to hear
7 appellant's appeal of the Department's acceptance for processing of a
8 permit application for a proposed hazardous waste facility, arguing
9 such acceptance constitutes a "decision". (Appellant does not contend
10 that a permit has been approved or denied).

11 2. Appellant is correct in asserting that there may be appeals
12 from both orders and decisions. RCW 43.21B.010. However, in the
13 arena of appealable decisions, the Board is restricted to hearing
14 appeals from the Department's issuance, modification, or termination
15 of any permit or license or from decisions in contested cases, as
16 defined in the State Administrative Procedures Act (APA") RCW
17 34.04.010(3). That section states:

18 (3) "Contested case" means a proceeding
19 before an agency in which an opportunity for a hearing
20 before such agency is required by law or constitutional
21 right prior or subsequent to the determination by the
22 agency of the legal rights, duties, or privileges of
23 specific parties. Contested cases shall also include
24 all cases of licensing and rate making in which . . . a
25 license is revoked, suspended, or modified, or in which
26 the granting of an application is contested by a person
27 having a standing to contest under the law or agency
rules.

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1 3. The Department's mere acceptance of a permit application for
2 processing constitutes neither an order, nor a permit or license
3 issuance, modification or termination, nor a "contested case" under
4 the APA.

5 4. Appellant further contends that RCW 34.04.080 provides the
6 Board with jurisdiction. RCW 34.04.080 states in pertinent part that
7 if an agency issues a declaratory ruling, such ruling:

8 "is subject to review in the superior court
9 of Thurston County . . . "

10 5. Even if such ruling had been issued, Superior Court, not the
11 Board, has the immediate appeal jurisdiction.

12 6. Appellant further contends that WAC 173-303-845 provides
13 jurisdiction for appeals of decisions to the Board. The statutory
14 authority for this code provision includes Chapter 70.105 RCW, which
15 provides at RCW 70.105.075 for appeals to the Board from "a compliance
16 order or by any decision of the department regarding a compliance
17 order in accordance with chapter 43.21B RCW." RCW 70.105.080 also
18 provides for appeals to the Board of civil penalties. Lastly, RCW
19 70.105.250 provides for appeals to the Board in regard to local
20 planning requirements under RCW 70.105.220 or the designation of zones
21 under RCW 70.105.22.

22 Appellant has not proven that any of the above necessary facts
23 exist in this case, i.e. no appeal of a compliance order, civil
24 penalty, local planning requirement or zoning designation. Hence WAC
25

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1 173-303-845 does not, as applied, support Board jurisdiction.

2 7. In the arena of solid waste siting, the Board has additional
3 appeal jurisdiction under Chapter 70.95, when a jurisdictional health
4 department has issued a permit pursuant to RCW 70.95.180 for the
5 operation of a new or existing solid waste disposal site. The
6 Department may appeal such a permit decision to the Board. RCW
7 70.95.185. Such facts are, again, not presently before us.

8 8. Appellant appears to also be contending that the Board has
9 jurisdiction to review the Department's rules under chapter 34.04 RCW,
10 even if a contested case is not before us. Absent a contested case,
11 the Board has no jurisdiction to review the validity of an extant DOE
12 rule. Seattle v. DOE, 37 Wn.App. 819 (1984).

13 9. Alternatively, appellant appears to contend that its
14 correspondence with DOE, on file in this appeal, is a petition to
15 engage in rulemaking pursuant to RCW 34.04.060, and that DOE's failure
16 to act on the petition constitutes a decision appealable to this
17 Board. Appellant cites no legal authority in support of this
18 conclusion. Absent statutory authority specifically granting
19 jurisdiction, or necessarily implied by the statute, the Board does
20 not have jurisdiction to hear appeals. Id. In addition, appellant
21 has not proven that his numerous filings are, in fact, a petition to
22 engage in rulemaking. The Department concluded (January 6, 1987
23 letter) that appellant was petitioning to apply regulations already in
24 place, not petitioning the Department to engage in ruling.

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1 THEREFORE, the motion to reconsider or set aside is DENIED.

2 The Board further orders that the April 30, 1987 Order of
3 Dismissal be modified at p.4 line 1 as underlined below:

4
5 "'pollution control boards . . . RCW 43.21B.110 . . .'"
6

7 DONE this 2nd day of June, 1987 in Lacey, Washington.
8

9 POLLUTION CONTROL HEARINGS BOARD

10 Judith A. Bendor
11 JUDITH A. BENDOR, Member

12 Lawrence J. Faulk 6/2/87
13 LAWRENCE J. FAULK, Chairman

14 Wick Dufford
15 WICK DUFFORD, Member
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2 POLLUTION CONTROL HEARINGS BOARD
3 STATE OF WASHINGTON

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5 Appellant,)

6 v.)

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8 DEPARTMENT OF ECOLOGY,)

9 Respondent.)
10 _____)

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ORDER DISMISSING
APPEAL

11 On March 13, 1987, appellant Friends of the Columbia, Inc.,
12 ("Friends"), filed an appeal with the Pollution Control Hearings Board
13 ("Board"), from a series of actions of the Department of Ecology
14 ("DOE"), including DOE's acceptance for review of an application by
15 Rabanco and Environmental Security Corporation for a permit to operate
16 a hazardous waste facility.
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1 In addition, on May 25, 1986, Friends petitioned DOE to alter its
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3 procedures to allegedly conform to federal law regarding the
4 acceptance of the application certification. Friends alleges that DOE
5
6 did not substantively respond to its petition until January 6, 1987.

7 Friends further requests that the Board waive the 30-day
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9 requirements to appeal, and specifically prays for relief from the
10 Board as follows:

11
12 1. Require DOE to refuse to accept the hazardous waste facility
13 application, and stop all processing of the application until it
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15 applies to the Environmental Protection Agency ("EPA") to modify DOE's
16 Hazardous Waste Management Certification Program and EPA acts thereon;

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18 2. Require DOE to act on Friends' petition or provide other
19 relief requested in the petition;

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21 3. Require DOE to apply to EPA for such program modification; and

22 4. Require DOE to cease acting on the application until this
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24 Board rules on this appeal.

1 There is no evidence in this record that the Department has issued
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3 an Order denying or approving the application for the hazardous waste
4 facility.

5 Appellant was advised by Board letter, June 1, 1987, that the
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7 appeal would likely be dismissed for lack of jurisdiction, but that
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9 written responses to the proposed dismissal would be accepted from the
10 parties. Appellant Friends and DOE filed written responses.

11 Having reviewed the file herein, and being fully advised, the
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13 Board concludes:

14 1. Timeliness of the appeal (i.e. within 30 days from DOE's
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16 response to the petition) is not the key legal issue herein. Rather,
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18 it is a question of ripeness for appeal to the Board, a statutory
19 jurisdictional issue.

20 2. The Board is a quasi-judicial entity, created by statute,
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22 which has jurisdiction "to hear and decide appeals from any person
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24 aggrieved by an order issued by the Department [DOE] or by air

1 pollution control boards. . . " RCW 43.21B.100 (emphasis added), or as
2 otherwise provided by statute, e.g. RCW 70.105.250. This limits the
3 Board to hearing contested cases as defined in the State
4 Administrative Procedures Act, RCW 34.04.010(3). See Seattle v.
5 Department of Ecology, 37 Wn.App. 819, 883 P.2d 244 (1984). The Board
6 has only that jurisdiction granted to it or necessarily implied.
7
8

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10 3. The Board does not have jurisdiction to hear appeals which
11 challenge the application review procedure of DOE, when no order has
12 yet been issued. Such assertion of jurisdiction would impermissibly
13 interfere with the Department's exercise of its discretion. See
14 Peterson v. DOE, 92 Wn.2d 306, 596 P.2d 285 (1979).
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17 4. An appeal challenging DOE's rules themselves (rather than as
18 applied through an Order) is akin to a declaratory judgment action,
19 which is outside this Board's jurisdiction. Seattle v. DOE, supra.
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1 5. The Board has jurisdiction to hear petitions for declaratory
2 rulings regarding the applicability of rules as opposed to their
3 validity. WAC 371-08-240.
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5 6. Further, any interested party may petition the Board for
6 promulgation, amendment or repeal of the Board's own rules. WAC
7 371-08-245.
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10 7. Appellant's challenge in this case, however, is directed to
11 the validity of DOE's rules. Such challenge is not within the ambit
12 of the aforecited WAC sections allowing petitions to this Board.
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14 8. The Board is without jurisdiction to consider appellant's
15 requested appeal, since there is no order extant on appeal before the
16 Board.
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19 If DOE were to issue a final order granting or denying the
20 application for a hazardous waste facility, under current law such
21 order could be appealed to the Board. WAC 173-303-845.
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ORDER

THEREFORE, the appeal is DISMISSED.

DONE this 30th day of April, 1987.

POLLUTION CONTROL HEARINGS BOARD

Judith A. Bendor 4/29/87
JUDITH A. BENDOR, Member

Lawrence J. Faulk 4/29/87
LAWRENCE J. FAULK, Chairman

Wick Dufford
WICK DUFFORD, Member